Department of Justice Canada
Ministère de la Justice Canada

ABORIGINAL PEOPLE and JUSTICE ADMINISTRATION

A Discussion Paper

September, 1991

Canada

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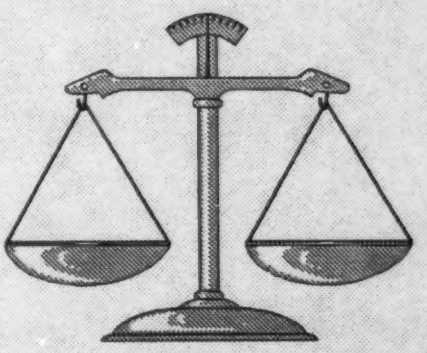

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MESSAGE FROM THE MINISTER

With this Discussion Paper, I am very pleased to invite aboriginal organizations and communities, my federal, provincial and territorial colleagues and all interested Canadians to participate in a new initiative to improve the administration of justice as it affects aboriginal people. I describe this as a new initiative in part because Mr. Lewis, the Solicitor General, and I have been provided with $26.4 million over the next five years to work with aboriginal people, the provinces and the territories, and the Minister of Indian Affairs and Northern Development and other colleagues to make justice administration more responsive to aboriginal aspirations, needs and concerns. Perhaps most important, I describe this as a new initiative because it is based on a commitment to a new relationship between the system of justice and aboriginal people, a partnership based on respect and trust. And it is through this partnership that a practical agenda for reform can be shaped and implemented.

It has become undeniable that our system of justice is not working for aboriginal people. Aboriginal justice reform is therefore one of my highest priorities. Our system of justice must be made more inclusive - more responsive to aboriginal values and aspirations, fairer in its treatment of aboriginal people and effective in meeting the needs of aboriginal communities. To these ends, the Solicitor General and I will be consulting on how we can promote and support:

a) effective consultations with aboriginal organizations and communities, and provincial and territorial governments;

b) cross cultural training for judges and justice officials;

c) public legal education and information sharing for and by aboriginal communities;

d) strengthened legal services for aboriginal people;

e) training and recruitment of aboriginal lawyers;

f) pilot projects with interested provinces/territories and aboriginal communities to test community-based approaches to policing (off-reserve), crime prevention, adjudication and dispute resolution, corrections and release; and

g) research on customary approaches to justice administration.

We can, by working together with patience and trust, create a justice system which includes all Canadians, responds to aboriginal aspirations and respects the unique Constitutional position of aboriginal people. We will all be better served by a system embracing aboriginal concepts of justice and community.

A. Kim Campbell, P.C., Q.C., M.P.
Minister of Justice and Attorney
General of Canada

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CHAPTER 1
Introduction

1.1 Purpose of Paper

The purpose of this discussion paper is to promote and facilitate focused and constructive dialogue on how to improve the administration of justice as it affects aboriginal people. Its focus is on practical measures, options for action, and on partnership and a new relationship between the justice system and aboriginal people. Between September 4 and September 7, 1991, Kim Campbell, the federal Justice Minister and Margaret Joe, the Yukon Justice Minister, will be co-hosting a conference in Whitehorse, to identify priorities and develop a practical agenda for aboriginal justice reform. Entitled *Achieving Justice*, the Conference will bring together, from across Canada, aboriginal leaders, federal, provincial and territorial Ministers responsible for justice administration, justice professionals and practitioners and community workers. Participation, which will be 50% aboriginal, will reflect the commitment to partnership and inclusiveness. This discussion paper is intended not only to contribute to this Conference but also to support on-going consultations with aboriginal organizations, aboriginal communities, provincial and territorial governments and all those interested in improving the system of justice administration. Thus, the paper should help to set the stage for joint efforts to improve federal programs, select pilot projects to test innovative approaches, and determine directions and priorities for research and policy development.

This dialogue is intended to include all aboriginal people, whether status or non-status Indians, Inuit or Métis, on or off reserve, in urban or rural centres and no matter where in Canada they reside. Recent events, the various provincial inquiries and reports on aboriginal justice issues and a growing body of statistical information reveal disproportionately high rates of crime and victimization in aboriginal

communities and over-representation of aboriginal people as accused in courts and as inmates in federal and provincial correctional institutions. Aboriginal people increasingly express a deep alienation from a system of justice that appears to them foreign and inaccessible. Coordinated action is required immediately to deal with the spiralling human and economic costs to aboriginal communities of these problems.

1.2 THE CONTENTS

The Paper offers for discussion:

a) an overview of the issues which the federal government believes must be addressed in new aboriginal justice policies and programs;

b) a proposed statement of objectives and principles to guide federal participation in joint efforts to improve aboriginal justice;

c) a range of options for action to meet the objectives, consistent with the principles proposed. This includes a discussion of policing and crime prevention, legal services, courts and adjudication, sentencing, corrections, and young offenders.

The proposals and options are the result of interdepartmental cooperation, and both formal and informal consultations with aboriginal people, provincial and territorial governments and justice professionals and practitioners. This paper builds on the work of a number of related initiatives.

CHAPTER 2 Overview of Issues

2.1 ABORIGINAL PEOPLES: DIVERSITY OF CIRCUMSTANCES AND ASPIRATIONS

The process of finding common ground, a consistent approach to aboriginal justice, is complicated by the diverse circumstances of aboriginal people and communities. Census data indicate that there are 711,120 aboriginal people, about 2.8% of Canada's total population, 84% living west of Quebec. Most experts, however, estimate the actual figure to be much higher and growing more rapidly than the rest of the population.

Aboriginal people are a unique component of Canada's population. They are, at the same time, internally extremely diverse in culture, language and history. The circumstances and aspirations of aboriginal people also vary in terms of geography, patterns of land use, and a number of other factors.

Status Indians, as defined by the *Indian Act*, are located primarily on reserves and in remote rural areas. Non-status Indians and Métis more frequently reside in urban areas and, with some notable exceptions, are more dispersed than the status Indian population. The Inuit live in relative isolation and, in most instances, constitute a majority in those regions of Canada in which they reside.

In most cases, living conditions and economic prospects on reserve and in many Métis communities are marginal. Over the past 20 years, significant numbers of status and non-status Indians and Métis have moved to larger urban centres seeking to improve their prospects and in some western cities now comprise as much as 1/4 of the population.

As all communities, aboriginal communities are also internally diverse. The National Symposium on

Women, Law and the Administration of Justice, hosted by the Minister of Justice and Attorney General of Canada, Kim Campbell in Vancouver in June, 1991, revealed the "double discrimination" and special needs of aboriginal women as victims of crime and in their contacts with the justice system.

The National Aboriginal Network on Disability has documented the relatively high rates of disability in aboriginal communities, which can no doubt be traced to poor living conditions, victimization and substance abuse, and documented the special needs of this population for culturally appropriate services.

Any approach to improve aboriginal justice will have to recognize and accommodate the diversity of needs, circumstances and aspirations that inevitably characterize the aboriginal population.

2.2 CRIME, VIOLENCE AND CONFLICT WITH THE LAW

Report after report has documented that aboriginal people have high contact rates with police and disproportionately high rates of arrest, conviction and imprisonment. Although less than 3% of Canada's population, in 1991, aboriginal people comprise 11% of the population of federal institutions and nearly 15% of the provincial prison population. Aboriginal offenders are also less likely to be paroled early in their sentences. Incarceration rates are even higher for aboriginal women. Aboriginal youth are also disproportionately represented in juvenile detention facilities. General aboriginal over-representation is particularly acute in some jurisdictions and regions. For example, among the western provinces, aboriginal admission rates ranged from a low of 19% in British Columbia to a high of 66% in Saskatchewan, where aboriginal people comprise approximately 10% of the population. There is every indication that the problem is worsening, given that the federal aboriginal inmate population is increasing at more than twice the national rate. Saskatchewan government data show in addition that while the sentences given aboriginal offenders have become shorter on average, they have become more frequent and increasingly involve offenses against the justice system itself in the form of failure to appear for court and default in paying fines.

While there may be persistent debates among social scientists about the precise link between social and economic conditions and crime, few would dispute that the poor social and economic conditions suffered by many aboriginal peoples go a long way to explaining the high rates of crime, and specific problems of substance abuse and family violence.

Those aboriginal offenders incarcerated in federal penitentiaries are often marginalized and

disadvantaged, often unemployed, with poor records of employment and education and with histories of alcohol abuse. Many had previous negative experiences with the systems of child welfare, youth justice and criminal justice.

Any approach to aboriginal justice will therefore have to cut across the jurisdictional barriers that divide government departments and levels of government and will have to address the complex interplay between crime prevention and social, cultural and economic development.

2.3 Overt and Systemic Discrimination

Perhaps not surprisingly, Justice Department studies indicate that aboriginal people believe they are dealt with more harshly by the justice system generally, and that in court they often do not understand the nature of the sentence hearing or the sentence itself. The recent suicides among federally incarcerated aboriginal women may reflect the mixture of frustration, resignation and resentment among aboriginal people revealed in the Justice studies. In 1988, a majority of aboriginal people questioned in a Canadian Sentencing Commission study thought both police and prison staff were racially prejudiced in their treatment of aboriginal people. The Task Force on the impact of criminal justice on aboriginal people in Alberta also raises the issue of racism in the justice system. Even if exceptional, incidents such as the Donald Marshall, Jr. case fuel such concerns. The report of the *Nova Scotia Royal Commission on the Donald Marshall, Jr. Prosecution* concluded that "the criminal justice system failed Donald Marshall at virtually every turn from his arrest and wrongful conviction in 1971 up to - and even beyond - his acquittal by the Court of Appeal in 1983." The Commissioners also concluded that the situation could have been easily remedied at any point by justice professionals, and "that Donald Marshall, Jr. was convicted and sent to prison, in part at least, because he was a Native person."

The perception among aboriginal people that the justice system is alien appears to be pervasive and increasing. The federal government's consultations on sentencing reform revealed the complexity of the issues. Perceptions of unfairness may be fuelled not so much by overt discrimination but by systemic discrimination in a system of justice that does not adequately accommodate aboriginal people. Although the evidence suggests that aboriginal people are not, for the most part, sentenced more harshly,

the consequences of apparently equal sanctions may, by virtue of differences of culture and circumstances, be experienced differently by aboriginal and non-aboriginal people.

At the same time, aboriginal people are represented in the criminal justice system generally only as victims or defendants. There are few aboriginal lawyers and fewer aboriginal judges. Aboriginal people are consistently under-represented in police forces and corrections staff, as well as in both federal and provincial public services. Recent progress has been noted in the increased number of aboriginal people entering law schools over the past ten years; however, relatively few are working within the justice system.

Clearly some aboriginal people have come to view the system as their enemy, a view too often derived from first hand experiences with the systems of child welfare, youth justice, family court and criminal justice. Thus, any approach to reform will have to address both overt and systemic discrimination.

2.4 PERCEPTIONS OF JUSTICE

In many respects, the system of justice administration may be at odds with traditional aboriginal approaches to the resolution of disputes and the restoration of order. Traditional aboriginal approaches to justice, still practised by many communities and being recovered by others, were integrated with community social, economic and religious institutions. Departures from community expectations were dealt with generally in a manner designed to foster social harmony, heal the "offender", recompense the victim and restore the community. Conflicts of interest and interpersonal or familial disputes were handled co-operatively, as is only possible where there exists a strong sense of community.

Furthermore, traditional aboriginal concepts of individual property, the value attached to sharing and the particular place of land in aboriginal cultures may clash with a legal system designed to meet the needs of a larger, more urban and anonymous society. In any case, there is growing evidence that many aboriginal people do not understand the justice system and many feel that it is not theirs. At the same time, many officials within the justice system have an inadequate understanding of aboriginal history, values, customs and traditions.

In some ways this gap in understanding is ironic. At a time when the Canadian system of justice is seeking ways of involving the community in preventing crime, assisting victims, and reintegrating offenders into the community, it has not made effective use of the distinctive aboriginal resources.

In some ways, the gap in understanding exacerbates aboriginal peoples' feelings of being excluded or, worse, victimized. Any approach to aboriginal justice will have to address this gap between aboriginal peoples and the system of justice administration.

2.5 SERVICES AND PROGRAMS

Furthermore, the very communities that have particularly high rates of family violence, sexual abuse and other forms of victimization are also least likely to have adequate justice services and programs for the prevention of crime and violence and for assistance to victims, particularly those who may be disabled. Rural and isolated communities experience difficulties in developing and sustaining justice services, and particularly specialized services to meet the needs of aboriginal women and youth and disabled aboriginal people. These communities typically lack the social and health services and recreational resources that can provide the infrastructure for such justice services. While programs and services do more often exist in urban centres, they are often inappropriate for meeting the distinct needs of the aboriginal people in those centres.

Generally, as pointed out in the Alberta Task Force Report, aboriginal people are not sufficiently involved in the decisions that affect them and in the design and delivery of programs and services. Any approach to aboriginal justice will have to be based on full and effective aboriginal participation in policy development and program design and delivery.

2.6 GOVERNMENT RESPONSE

Progress is being made on a variety of fronts. A number of aboriginal organizations and communities have taken a lead role in identifying and defining the needs and developing solutions. All levels of government are faced with growing calls to assist these efforts and respond to aboriginal justice problems. Several provinces are seeking to establish more comprehensive policies and to take a more proactive approach. Quebec is undertaking consultations with aboriginal groups on the adaptation of the existing justice system to the aboriginal reality, as well as increasing aboriginal participation at all levels of the system. Saskatchewan has established a tripartite Indian Justice Review Committee and a parallel process with the Saskatchewan Métis community. These committees will make recommendations to the federal and provincial governments and the Federation of Saskatchewan Indians and the Métis Society of Saskatchewan on the administration of criminal justice and the development of community-based initiatives. Alberta has responded to concerns expressed by the Indian Association of Alberta and the Métis people of Alberta and, with federal participation, has published the recommendations of the tripartite Task Force on the impact on Indian and Métis people of the criminal justice system. Following a review of access to its justice system in 1988, British Columbia has set up a Steering Committee on Native Justice Issues to provide a forum for Indian bands, organizations and tribal councils to air their complaints and propose solutions. Nova Scotia has established a tripartite committee in response to the recommendations of the Marshall Inquiry to deal with policing, discrimination and justice administration matters, and in Manitoba planning is being heavily influenced by its own judicial inquiry which will likely make recommendations of far-reaching consequence. Other

provinces are examining strategies to respond to the issues faced in their jurisdictions.

In the area of criminal law, the federal government has agreed in two major comprehensive land claim agreements, the *James Bay and Northern Quebec Agreement* and the *Northeastern Quebec Agreement*, to discuss amending the *Criminal Code* and the *Canada Evidence Act* to adapt them to the usages, customs, ways of life, and circumstances of the district and community. Discussions in this regard are ongoing. In addition, the Department of Justice now considers aboriginal concerns in the development of legislation, as illustrated in proposals with respect to the gun control amendments of the *Criminal Code*. In related areas such as hunting and fishing prosecutions policy, the Department has formed internal committees to develop policies reflecting aboriginal concerns and legal developments. In addition, a major review of family law in the Northwest Territories is underway with funding support from the Department of Justice. The Minister of Justice has also asked the Law Reform Commission to study the *Criminal Code*, the *Young Offenders Act*, and related statutes, and to assess the extent to which they ensure that aboriginal persons are treated equitably and with respect. The Law Reform Commission report, expected in the fall of 1991, should provide a framework for case-by-case consultations with the provinces and aboriginal people on law reform.

The extensive consultations by the Minister of Justice and the Solicitor General on *Directions For Reform* in sentencing, corrections and conditional release revealed the need to strengthen aboriginal-specific programs, to create mechanisms that allow greater involvement of aboriginal people in all aspects of the sentencing and post-sentencing process, to give greater emphasis to diversion and sentencing alternatives, and to provide effective liaison for aboriginal people who come in contact with the system. Similarly, the Solicitor General recently

approved the recommendations of the *Task Force on Aboriginal Peoples in Federal Corrections* as a long-term blueprint for corrections and parole reform. In September, 1990, in response to the *Task Force on Federally Sentenced Women*, the Solicitor General and the Minister responsible for the Status of Women announced the closure of the prison for women in Kingston. The prison will be replaced by five regional facilities including a Healing Lodge for aboriginal female offenders.

In the area of federal law enforcement, a good deal of progress is being made in making federal programs more responsive to aboriginal needs. For example, the RCMP recently completed a fundamental review of aboriginal policing and has implemented reforms designed to improve the recruitment and career development of aboriginal officers, strengthen training of RCMP members, and improve the responsiveness of their services to aboriginal communities. In addition, the Department of Indian Affairs and Northern Development and the Ministry of the Solicitor General conducted a review of the Federal Indian Policing Program, and completed national consultations which have led to long overdue federal policy proposals designed to improve the coverage, effectiveness, and responsiveness of this program.

In the area of justice program delivery, the Justice Department has completed an inventory of aboriginal justice initiatives in every province and territory in Canada which illustrates the range of proposals being developed by aboriginal people, the range and diversity of projects in all jurisdictions, and the variety of federal and provincial departments and agencies involved. It also reveals serious gaps in programs and services, and the need for a co-operative approach if these gaps are to be addressed.

2.7 SELF-GOVERNMENT AND JUSTICE ADMINISTRATION

This paper recognizes the broad political aspirations of aboriginal peoples as reflected in constitutional negotiations on self-government. At the same time, much can be achieved now within existing arrangements, without prejudice to constitutional discussions and with respect for the Constitutional rights of aboriginal people.

Through the community self-government negotiations process led by Department of Indian Affairs and Northern Development, the federal government is responding to status Indian aspirations for immediate change by negotiating self-government arrangements at the community level.

Community negotiations are based on the following principles:

- new arrangements must substantially increase local control and decision-making;

- new arrangements must be flexible in order to recognize the diverse needs, traditions, and culture of aboriginal peoples; and

- new arrangements must lead to greater accountability by aboriginal governments to their own electors, rather than to the federal bureaucracy.

A broad range of topics can be discussed within the community negotiations process. They include items which are essential to the establishment of government such as: the institutions and procedures of government; membership; land and resources management; legal status and capacity; and financial arrangements. In addition they may also include other key aspects of community life such as:

education, culture, health, child welfare, social services, environment, and the administration of justice.

In all of these areas, and others which can be the subject of negotiations, the objective is to arrive at practical arrangements tailored to the specific circumstances of the communities. Above all, the approach and process is community driven.

In this context, the Department of Justice is currently negotiating with a number of aboriginal communities and provinces, to develop new justice arrangements which support increased self-reliance and autonomy for aboriginal communities.

Under the direction of the Minister of Justice, the federal government also participates in provincially-initiated tripartite discussions on self-government for aboriginal people living off-reserve. Such discussions are taking place in many provinces and in a number of them, the aboriginal association involved has indicated its desire to have administration of justice matters included.

This initiative is not intended to replace the constitutional process. Any arrangements which may result from negotiations are without prejudice to existing treaty and aboriginal rights or the eventual outcome of the constitutional discussions.

CHAPTER 3
Towards a Federal Policy

3.1 THE FEDERAL POLICY

Improved aboriginal justice is a key element of the federal government's overall aboriginal policy, referred to as the Native Agenda. This overall policy is built on the frank recognition that aboriginal people have too often been treated unfairly, with lack of respect, and with insensitivity to their language and culture, and that the current difficulties confronting many aboriginal people reflect that history.

First enunciated by the Prime Minister in an address to the House of Commons on September 25, 1990, the policy was reaffirmed in his speech of April 23, 1991 to the First Nations Congress in Victoria, B.C. It is based on "four pillars", the first of which is land claims. Negotiations on specific claims, treaty land entitlements and modern comprehensive land claims agreements will be accelerated and procedures improved. The second pillar is improving the living conditions on Indian reserves across Canada through joint action with provincial and local Indian community government. The third pillar calls for changing the relationship between aboriginal people and governments primarily by enlarging the capacity of aboriginal people for self-government. This will allow aboriginal people to take part more fully in Canadian growth and prosperity under the protection of Canadian laws and the Constitution. The fourth and final pillar addresses the wider aspirations of aboriginal people by a thorough review of their fundamental place and role in contemporary Canadian life. The establishment of a Royal Commission will be a major element of this aspect of the government's policy.

Aboriginal justice problems are no doubt symptomatic of the underlying social and economic problems confronting aboriginal people across Canada; however, family violence, substance abuse and

generally crime and delinquency contribute to and aggravate community disintegration and inhibit social and economic development. Aboriginal justice reform is therefore essential to achieving the objectives of the overall government policy and particularly to establishing a new relationship between aboriginal people and governments. Accordingly, in describing the third pillar of the policy to the House of Commons, the Prime Minister stated the intention of the federal government to "find practical ways to ensure that aboriginal communities can exercise greater control over the administration of justice." Eight months later in Victoria he enlarged upon this commitment with the pledge "to enter into discussions with the provincial governments and aboriginal people on a new approach to aboriginal justice."

This document is the first step in the development of that new approach. It is based on the principle that solutions must be found within the Constitution of Canada, present and future, as interpreted by the Supreme Court of Canada. In this sense, it does not envisage an entirely separate system of justice for aboriginal peoples, although community justice systems, for example as connected to aboriginal self-government, are both possible and desirable.

3.2 OBJECTIVES FOR JUSTICE ADMINISTRATION

Over 15 years ago, the federal government of the day sponsored a national conference on Native People and the Criminal Justice System in Edmonton, Alberta. Unfortunately, most experts would agree that the findings and recommendations of that conference remain largely relevant today. Although the relationship between aboriginal people and the justice system clearly is changing, much remains to be done.

A major obstacle to effective reform has been the absence of an explicit policy framework to ensure a consistent and coordinated approach by the various federal departments and agencies with responsibilities for justice administration and to provide a firm basis for federal participation in areas of shared responsibility.

One of the difficulties in developing such a framework is that problems of crime and justice do not respect formal lines of jurisdiction or the discrete mandates of government departments. It must be recognized at the outset that the justice system must often deal with the consequences of historically based social, economic and cultural inequity. The justice system or, for that matter, any single jurisdiction acting unilaterally may be ill-equipped to address the root causes of crime and related justice problems.

Thus, it is important to view federal initiatives in the larger context of the government's overall policy, which is premised on consultation with aboriginal people, provincial and territorial governments and respect for the fiduciary obligation of the Crown, and is designed to foster a new relationship based on dignity, trust, respect and equitable participation in Canada's prosperity. The policy objectives for improved justice administration for aboriginal people

must be practical, focusing on the achievable, recognizing that this is one aspect of achieving justice for aboriginal people, and that enduring reform will best be achieved through the cooperative efforts of numerous departments and agencies in all jurisdictions and the full and effective involvement of aboriginal people.

The policy objectives must also respect both the unitary and pluralistic aspects of justice administration. All Canadians are entitled to the equal protection of the law and the protections guaranteed by the *Charter of Rights and Freedoms*, but this in no way denies the importance of differential treatment of aboriginal individuals and communities as necessary to ensure equality and respect for their unique and diverse spiritual and cultural beliefs, aspirations and circumstances and their special place in Canada as reflected in the Constitution.

Perhaps most important, the policy objectives must recognize the importance of restoring the relationship between the justice system and aboriginal people. For over a decade, there has been a growing recognition that the Canadian justice system may have become too formal, too remote from the communities it serves. Thus, every component of the justice system has been exploring new approaches that involve the community, that encourage not only community participation but greater community responsibility for crime prevention, victim assistance and justice administration. Nevertheless, it is apparent that the gap between aboriginal communities and the justice system has not narrowed significantly. Clearly, a major challenge confronting the justice system will be to ensure that aboriginal people participate at all levels of justice decision making and that aboriginal communities are empowered to take greater responsibility for their problems and for addressing those problems. Only in this way will the justice system be seen by aboriginal people as their system

and only then can justice administration be, and be seen to be, fair and effective.

Finally, the policy objectives must be consistent with and supportive of the broader federal objectives and policies related to self government and fostering greater control and responsibility for aboriginal communities more generally. This paper is based on the recognition that the justice system must respect the Constitutional rights of aboriginal people, both present and future, and on the belief that there exist, within the Canadian constitution and system of justice administration, untapped opportunities for addressing the aspirations of aboriginal people. This will require the consideration of a wide range of options, from adapting current arrangements to developing new approaches. The current processes of justice administration which aboriginal people encounter will have to be made better. New processes which are based in the community and embrace aboriginal perspectives will have to be developed, and all of this will require a commitment to dialogue and partnership.

In this context, the following is proposed as the statement of objectives for the federal government's policy on administration of justice for aboriginal people:

> The purpose of the aboriginal justice policy is to support the federal government's overall policy by enhancing its contribution:
>
> - to the equitable participation of aboriginal peoples in the overall system of justice and to their effective participation in shaping justice policy and delivering justice programs;
>
> - to the reduction of the economic and social costs of crime by and against aboriginal peoples, and to the preservation

of peace, safety and order in aboriginal communities;

- to the equitable and fair treatment of aboriginal persons by the justice system in a manner that respects aboriginal culture and the unique history and circumstances of aboriginal people and which responds to the special needs and aspirations of aboriginal peoples; and

- to increasing responsibility of aboriginal communities for justice administration, compatible with and supportive of government policy and negotiations on self-government.

DISCUSSION QUESTIONS

1. Are these objectives appropriate? Comprehensive?

2. Should the objectives be ranked in priority and if so what should be the relative priorities?

3.3 POLICY PRINCIPLES

If there is one theme common to all of the recent inquiries and task forces it is the recognition of the need for immediate, practical and coordinated action. While there has been an evident intensification of activity in most jurisdictions and a number of very promising initiatives, there remain large gaps, unevenness and, most important, a lack of the coordination necessary if progress is to be deliberate, cumulative and enduring.

The federal government is therefore proposing a number of principles designed to guide its activity in this area:

Level and Quality of Service

a) Aboriginal people should have: access to justice programs and services equal to that enjoyed by all Canadians; fair treatment by the justice system, respectful of the individual and the needs and circumstances of aboriginal peoples; and equitable participation in all aspects of the administration of justice.

b) Aboriginal communities should have access to at least the same optional models of justice administration that are available to similar communities in the region.

c) Any special measures or arrangements developed to meet the unique needs and aspirations of aboriginal communities should meet standards with respect to the quality and level of service that would be comparable to similar communities in the region.

These principles are intended to affirm that aboriginal individuals and communities are entitled to the equal protection of the law and the protections of the *Charter of Rights and Freedoms*, but should be treated in a manner that respects their unique history, circumstances and cultures. Aboriginal justice policies must provide sufficient flexibility in their application to ensure that programs and services can be adapted where required to meet the special needs and circumstances of individual communities across the country and the needs of special groups within those communities, including aboriginal women and youth, and disabled people.

Clearly, these principles assume that the justice system provides a great deal of flexibility to address aboriginal aspirations, but at the same time these principles recognize that this will require a great deal of creativity in adapting current arrangements and developing innovative arrangements where necessary.

Culture and Responsiveness

d) Justice officials should receive appropriate training to ensure respect for the individual and for the diverse cultures and aspirations of aboriginal peoples.

e) Aboriginal persons should have access to culturally appropriate information about the legal and justice systems.

These principles recognize the current and historical gap between aboriginal people and the justice system and affirm the importance of closing that gap by increasing mutual understanding. In part, this requires greater awareness and greater sensitivity to aboriginal people within the justice system. Justice administration and service delivery are most effective when conducted by those who understand and respect the culture and perspective of the community they

serve. This will require the recruitment of more aboriginal people within the system (as indicated in the previous principles) and a commitment to cross-cultural training specifically focused on aboriginal issues and emphasizing the special legal and constitutional position of aboriginal peoples.

In addition, closing the gap will require ensuring that aboriginal peoples understand the system and their rights within it, and this will require a commitment to community education and information that is accessible, culturally appropriate and respectful of aboriginal values, traditions and concerns.

In sum, these principles recognize the importance of strengthening the communication between the justice system and aboriginal communities if a new relationship is to be established.

Tripartite Approach

f) All policy and program initiatives should respect, without prejudice to constitutional negotiations, the current roles and responsibilities of the levels of government, and the unique history and circumstances of aboriginal peoples.

g) All policy and program initiatives should be based on tripartite consultations.

h) Funding arrangements for developmental projects and justice programs and services provided to aboriginal communities should reflect the shared obligations and responsibilities of the federal and provincial governments and the communities on the basis of consistent and equitable funding arrangements and a mutually acceptable formula that

serves to support the aforementioned principles.

Jurisdictional ambiguity has no doubt been a significant stumbling block in this area. The administration of justice in Canada has unitary characteristics (e.g. criminal law and procedure) as well as characteristics of shared jurisdiction (e.g. enforcement of criminal law). Federal government authority for aboriginal justice administration flows primarily from s.91(24) (Indians and lands reserved for Indians), s.91(27) (Criminal Law and procedure), s.96 (appointment of Superior Court Judges) and s.101 (establishment of courts) of the *Constitution Act, 1867*. In the case of the provinces, the authority stems primarily from their specific heads of power in relation to the administration of justice (s.92(14) of the *Constitution Act, 1867* and property and civil rights (s.92(13) of the *Constitution Act, 1867*).

Given the general federal power over criminal law and procedure and the overall provincial responsibility to administer justice, it is very difficult to draw a clear line separating federal from provincial jurisdiction. The provincial power to make laws regarding the administration of justice in the province generally must, of necessity, touch upon matters of criminal procedure, if only incidentally. Since neither level of government is easily able to proceed unilaterally, a high degree of cooperation is required in order to make the system work. Present constitutional arrangements provide considerable scope for the exercise of both federal and provincial legislative authority in meeting aboriginal aspirations.

In this context, the most appropriate approach to aboriginal justice administration is often a tripartite approach that involves the federal government, provincial and territorial governments and aboriginal people in joint action. This also means that funding arrangements should reflect legislative jurisdiction, and cost-sharing in areas of shared responsibility

should be based on formulae agreed by all parties, reflective and respectful of the benefits and responsibilities accruing to both levels of government.

Alternative Arrangements

i) Consideration should only be given to special measures or alternative arrangements that fall within Canadian constitutional arrangements in effect at the time, and the relationship between any proposed aboriginal programs and the existing federal and provincial justice systems should be clear and agreed.

j) Any alternative aboriginal justice arrangements should be administratively and financially practical, taking into account the size of the community, community infrastructure, and the resources available.

k) The development of new aboriginal-administered arrangements should provide for a phased (multi-year) implementation period. Provisions should be made for community involvement in planning and for increasing community responsibility.

l) The development of any alternative aboriginal justice arrangements should keep sight of the principles of fundamental fairness, taking into account community standards. Aboriginal communities should have a clearly defined role in the administration of justice through appropriate accountability mechanisms which at the same time ensure the requisite level of independence.

m) Arrangements for aboriginal communities should ensure the availability of mechanisms of review and individual grievance and redress.

These principles recognize the importance of aboriginal communities having greater control over justice matters through adaptation of existing structures and development of new arrangements in the context of self government negotiations and more generally. At the same time, the principles attempt to reflect the challenges confronting the system and aboriginal communities in developing such new arrangements. Clearly, adaptations and new arrangements will only be successful if aboriginal communities are fully engaged in their planning and evolution, if they are designed with appreciation of the varying capacities of communities to develop and manage programs, and, most important, if they are developed on the basis of a shared understanding of the links between new arrangements and other components of the system. It will also be imperative that communities resolve the potentially difficult fit between the demands of procedural fairness and independence and the traditional, less formal approaches which may inform new arrangements. A variety of projects and negotiations already underway indicate that these challenges can be met though this will demand dialogue based on mutual respect, openness and trust.

DISCUSSION QUESTIONS

1. Are the principles appropriate for guiding federal initiatives in this area?

2. What other principles might be considered for inclusion?

CHAPTER 4
Options for Action

4.1 INTRODUCTION

Various federal departments - the Department of Indian Affairs and Northern Development, the Ministry of the Solicitor General, the Department of Justice, and others - have supported and are supporting initiatives to improve the quality of justice for aboriginal people. This has allowed consideration of a broad range of options for change. Clearly no blueprint, no single model, will be appropriate to all circumstances. The following pages present for discussion a range of options for practical action consistent with the proposed principles. These options are intended solely as a starting point for developing tripartite initiatives tailored to the specific needs of specific regions and communities.

4.2 POLICING

In many respects the relationship between the police and the aboriginal community both reflects and shapes aboriginal concerns about their relationship with government more generally. The police are the first and most frequent contact that aboriginal people have with the justice system and as such often are seen to represent that system.

All the recent reports and inquiries and particularly the Blood Inquiry in Alberta have raised serious concerns about police/ aboriginal relations. Recognizing that the relationships between some police forces and some aboriginal communities are quite good, it appears nevertheless that aboriginal people, and particularly aboriginal offenders, perceive that they are treated more harshly by the police, that the police discriminate against aboriginal people and that this is one of the reasons for the persistent over-representation of aboriginal people in correctional institutions.

Major new policy with respect to on-reserve policing has been announced by the Minister of Indian Affairs and Northern Development and the Solicitor General and negotiations on this policy will be conducted through a separate process. There remains considerable scope for action with respect to policing off-reserve.

On-Reserve

There is considerable variation in the policing services provided to Indian communities. These services range from band constables with limited jurisdiction who supplement the services provided by other police services (usually provincial police), to provincial police (regular or Indian contingent), to Indian administered police services, or a combination of a number of different types of services.

Despite this variation, there are a number of relatively common concerns which have been raised by Indian groups and provincial governments concerning police services to Indian communities. These concerns include:

1. Level and Quality of Service

Concerns have been expressed by some communities that there are often insufficient numbers of officers to respond adequately to non-discretionary demands driven by the high crime rates in Indian communities and at the same time to provide the type of proactive discretionary police services (e.g. crime prevention, victims assistance and police/community relations activities) desired by the community. In addition, rural and isolated communities in particular have expressed concerns about poor response time often due to policing services being located relatively far from communities.

As well, many police officers, especially Band Constables, do not have the training or experience to allow them to undertake a wide range of policing duties. In this regard, many Indian communities are concerned about lower standards for their local officers which they believe may result in "second class" policing.

2. Jurisdiction and Responsibilities

Concerns have also been expressed about the considerable variation from community to community in policing responsibilities and jurisdiction to enforce federal, provincial, and local laws. Generally, it is considered desirable to have all police officers trained and empowered to enforce the full range of laws.

3. Culture and Responsiveness

Aboriginal communities have expressed concerns both about their limited opportunity to have input into

policing models and priorities, and about the cultural appropriateness and sensitivity of the policing services provided.

4. Access to Policing Options

Some communities and governments believe that Indian communities should have access to the same range of policing options as do non-Indian communities, for example, the ability to contract for policing services and increased opportunities for self-governed policing models.

5. Funding of Policing Services

Many Indian communities believe that their policing services suffer from inadequate funding.

The Indian Police Policy which has recently been announced by the Minister of Indian Affairs and Northern Development and the Solicitor General of Canada is designed to address the concerns which have been raised in relation to on-reserve policing. The policy is intended to facilitate the development of professional policing services to Indian Bands consistent with the fundamental principles that govern the exercise of the police function in Canada, and to enable Bands to contribute to decisions on the level and quality of policing, to select a police service model from a range of options, and to exercise appropriate direction over their policing services.

The RCMP has recently made changes to its Indian constable program which have resulted in Indian Constables having the same training, range of powers, and status as their non-aboriginal counterparts. Furthermore, the RCMP has instituted a Constable Development Program which will enable candidates who do not meet recruitment standards to be provided with upgrading to allow them to meet entrance standards. The RCMP has also developed a range of consultative mechanisms to allow Indian

communities to voice their opinions and give advice on policing issues of community concern.

The Ministry of the Solicitor General is also involved in a wide range of policy and research activities designed to contribute to the provision of professional, progressive, and culturally sensitive policing services for Indian communities. These include national research into police accountability and independence mechanisms in Indian communities, and the development of professional policing materials to assist police.

Off-Reserve

Generally, policing services to aboriginal citizens living off-reserve are provided by municipal or provincial police services (including provincial police under contract to municipalities). The concerns which have been raised regarding these services include:

1. Aboriginal Representation

Many police departments do not have aboriginal members proportionate to the aboriginal population in their jurisdiction. As well, many lack the recruitment and training programs necessary to address this situation.

2. Cultural Sensitivity

Concerns have also been expressed about police lack of understanding and sensitivity to aboriginal culture and values, and, in some cases, about overt discrimination. Generally aboriginal people believe they are more likely than non-aboriginal people to be arrested and charged.

3. Community Input

In many communities, aboriginal citizens are without formal mechanisms which allow them to voice their concerns to, and about, the police.

Currently, particularly in large urban centres, police agencies are focusing on cross-cultural training to assist non-aboriginal officers to understand and appreciate differences between aboriginal and non-aboriginal cultures. As well, a number of police agencies are developing mechanisms to allow the aboriginal community to advise police of issues of concern and to assist in resolving aboriginal/police problems. In this regard, the RCMP Aboriginal consultative Groups should help to strengthen the police/community relationship.

The Canadian Association of Chiefs of Police has established an Aboriginal Policing Committee composed of chiefs of police and members of the aboriginal community. The purpose of this committee is to provide a forum to discuss issues of mutual concern and to share information on aboriginal policing initiatives. In addition, the Ministry of the Solicitor General has initiated the Aboriginal Policing Series, a program designed to address research and policy issues of concern to police, governments, and aboriginal communities. The Series is intended to be of practical value to police officers working in aboriginal communities. Projects currently underway include a handbook for police officers dealing with the implementation of problem oriented policing in aboriginal communities, a national inventory of police programs and policies which focus on aboriginal communities, and a research study into barriers which affect the recruitment and training of aboriginal police officers.

DISCUSSION QUESTIONS

1. What are the priorities that should be addressed in negotiations on implementation of the recently announced Indian Policing Policy for on-reserve policing?

2. What areas show greatest promise for making off-reserve policing services more responsive to the needs of aboriginal people and communities?

4.3 COMMUNITY CRIME PREVENTION

Few would argue against the need to increase the priority attached to the prevention of crime in aboriginal communities. In the long term this will not only prove to be the most cost-effective approach but will help to reduce the social and economic costs of crime within aboriginal communities.

While there is no single recipe for effective crime prevention, a growing consensus among experts and practitioners holds that:

a) crime prevention must be a shared responsibility based in and driven by the community; and

b) community crime prevention must be tailored to the needs, priorities and resources of the community.

For example, approaches to crime prevention will be very different for aboriginal people in isolated and rural communities which may lack a social service infrastructure, and for aboriginal people in larger urban centres which may lack a strong identifiable community. In fact, an increasing majority of aboriginal offenders is drawn from such urban centres, and the growing urban aboriginal population presents a special challenge for developing innovative approaches to the prevention of crime.

Notwithstanding that community crime prevention will take different forms in different communities, some issues cut across most aboriginal communities, rural and urban, on and off reserve.

Over the past several years, Canadians have become increasingly sensitized to the profound individual and social consequences of family violence, and to the need for programs of prevention, protection and

assistance to victims and treatment of offenders. Available data suggest that family violence is a significant problem in many aboriginal communities. In their submissions to the Parliamentary Subcommittee on Family Violence, the Native Women's Association of Canada and other aboriginal womens' associations focused on the lack of services for women and children who are victims of physical, sexual and emotional abuse and who must therefore often search outside of the community for assistance. These submissions consistently emphasize the centrality of family in aboriginal culture and the importance of ensuring that approaches to prevention and victim assistance respect the uniqueness of aboriginal families and family lifestyles and holistic approaches to healing.

The consequences of such violence may often be felt particularly acutely by aboriginal victims in part because of the relative lack of services and in part because of a reluctance, particularly on the part of the female victims, to seek assistance through existing channels. Apart from the immediate suffering to the victims and the family, the consequences of this kind of violence can be enduring. For example, data on aboriginal offenders, particularly female offenders, often reveal histories of family violence and sexual abuse.

Thus, as part of its renewed family violence initiative, the federal government has focused special attention on aboriginal communities and is committed to assist aboriginal communities to develop approaches for the prevention of family violence and child sexual abuse and to deal with these issues in a manner suitable to their needs and cultures. Several provinces have also launched major initiatives. An integrated approach to community crime prevention for aboriginal people will have to give particular attention to issues of family violence and sexual abuse, and the special needs of women and youth.

Aboriginal submissions to the Alberta Task Force and other inquiries have also persistently emphasized concerns about youth who, according to these submissions, often reveal a sense of hopelessness or fatalism about their prospects and often also lack the positive influences that would be provided by having a grounding in aboriginal culture and language. Of particular concern is the potential for alcohol and solvent abuse among aboriginal youth.

Thus, many communities have implemented and are developing programs for the prevention and treatment of substance abuse, often with the help of the RCMP, other police forces, and both levels of government. The federal government has made the reduction of demand for drugs a major priority under the National Drug Strategy, and the Department of National Health and Welfare has helped to develop a number of innovative programs for reserve communities, many of them targeted at youth. Nevertheless, gaps remain, particularly in Métis communities and urban centres. Culturally based substance abuse and youth crime prevention programs must also be central in any integrated approach to community crime prevention.

A recurrent theme in the literature and submissions to various task forces has been the importance of empowering communities, and special groups within those communities, to identify and solve their own crime problems. Central to this are effective programs of public education and information. Recognizing this, the federal government has supported a number of national public education initiatives on the law and legal rights, crime prevention and special areas such as family violence. Research has shown that this information is for the most part inaccessible to and inappropriate for aboriginal communities. It would appear that special measures are necessary to ensure that both the content and medium of such information are relevant to aboriginal communities, and this will require the

full involvement of these communities in the design and delivery of public education.

DISCUSSION QUESTIONS

1. How can the federal government for its part most effectively promote and support community based crime prevention in aboriginal communities?

2. What practical measures should be taken to ensure that public information on aboriginal crime, legal rights and services, and other legal justice issues is consolidated and available, and accessible and culturally relevant, given the diversity of needs, cultures and aspirations of aboriginal communities and groups within those communities?

4.4 LEGAL SERVICES

Essential to strengthening the relationship between aboriginal people and the system of justice is to ensure that the major contact points are working well, based on mutual understanding and trust. Thus, it is of significant concern that aboriginal representatives addressing the Alberta Task Force had greatest criticism for the police and for the quality of legal-aid services available to them. Aboriginal submissions indicated that many aboriginal people are reluctant to seek out legal help which they too often find to be remote, alien and unsympathetic. These problems, which may well contribute to aboriginal over-representation and inhibit civil actions, may be attributed to a wide range of factors: the relative lack of aboriginal legal professionals; the absence of cross-cultural training for non-aboriginal legal professionals; the inappropriateness of current legal aid models for addressing aboriginal needs and concerns; and the physical remoteness of legal services for rural and isolated communities.

The Nishnawbe-Aski Legal Services Corporation in northern Ontario has been established to address some of these concerns. Under this "one-stop shopping" model, community legal workers provide public legal education, assist defence counsel (interviewing witnesses, obtaining information from the police) and play an active role in the court system (coordination of court circuits, commissioner of oaths, representation of clients before courts and tribunals etc.).

Native Courtworkers

One of the major attempts to bridge this gap has been the Native Courtworker Program. In 1977, the Interdepartmental Committee on Native People and the Law determined that the Department of Justice should sponsor a permanent program which would

ost-share courtworker services with the provinces and territories for aboriginal people accused of an offense under any federal or provincial statute or municipal by-law. The permanent program of cost-sharing commenced in 1978. Its main objective was to assist aboriginal people to understand their legal rights and responsibilities and to obtain equality before the law. The courtworker program's service model is consistent with federal policy in that it encourages aboriginal people to be actively involved in the resolution of their own problems.

The program has remained essentially unchanged since 1978, except for the inclusion of native courtworkers services to young offenders in the revised 1987 cost-sharing agreements. The preamble of the cost-sharing agreement describes the objectives of the Program as follows:

- assist aboriginal people to understand their right to speak on their own behalf or to request legal counsel, to better understand the nature of the charges against them and the philosophy and functioning of the criminal justice system;

- assist in enhancing the awareness and appreciation of the values, customs, languages and socio-economic conditions of aboriginal people on the part of those involved in the administration of the criminal justice system;

- respond to the problem and special needs caused by communication barriers which exist between aboriginals and those who are involved in the administration of the criminal justice system.

At present, programs do not exist in Saskatchewan, which withdrew from the program in 1987, Prince Edward Island, New Brunswick, Nova Scotia. In

Nova Scotia, discussions at the Tripartite Forum between Aboriginal, provincial and federal representatives have led to the identification of the establishment of a new program in the province as an immediate priority.

While it is fair to say that the Native Courtworker Program enjoys a degree of success and credibility in the Aboriginal community and is perceived by its clients as a sound and positive government initiative, it may be time for both levels of governments in close consultation with aboriginal communities to assess how it may better meet the diverse and changing needs of aboriginal peoples.

The Marshall Inquiry and the Alberta Task Force Report, among others, touched on the issue of the Native Courtworker Program and particularly on the range of services that courtworkers ought to provide. The Program has been changing in response to local demands. For example, in the Northwest Territories, the Mackenzie Courtworkers in the western region provide the same range of services as paralegals working under the umbrella of the legal aid scheme. This expanded role of Courtworkers will have significant implications for the objectives of the Program in this part of Canada.

Program changes are being implemented in various provinces to respond to local needs. For example, Manitoba's Court Communicator Program is being re-shaped to move away from the general perception that courtworkers are servicing the court and not the clients. The program was recently renamed the Manitoba Native Courtworker Program and has adopted a new and expanded mandate. The program will shortly undertake a needs assessment study, the results of which will determine future direction, service requirements and funding for the short and long term.

The expansion and adaptation of the Native Courtworker Program will have to come to grips with a number of persistent issues. Within its existing mandate, questions have been raised about the quality and consistency of the training that courtworkers receive. More broadly, concerns have been expressed for how to meet the needs of those not covered within the current mandate, victims and witnesses for example, and those seeking help in dealing with the civil justice system. Finally, concerns have been expressed about the range of services offered by these programs which may have unexploited potential in areas such as crime prevention, public legal education and assistance to victims.

Legal Studies for Aboriginal People

A number of agencies and departments have also been trying to respond to the under-representation of aboriginal people in the legal profession, an issue highlighted in the recent inquiries and task force reports. Federally, a program of legal studies for non-status and Métis people was established by the Department of Justice in 1973, to complement a similar program in the Department of Indian Affairs and Northern Development for status Indians. At its present level of operation, the program provides 10 three-year scholarships each year for legal studies by non-status Indians and Métis as well as financial support during the academic year to students on the basis of need. The program also provides 10 scholarships for pre-law orientation programs at the University of Saskatchewan (English) and the University of Ottawa (French). (Similar assistance is available to status Indians and Inuit from the Department of Indian and Northern Affairs).

To date, 91 law students have graduated from the program. At present, 30 students are in the three-year law studies program and an additional 10 students in the pre-law orientation program. The Canadian Association of Law Teachers have pointed

out that aboriginal lawyers remain under-represented in the Legal profession and have urged that the Department of Justice increase the level of its assistance to non-status Indians and Métis applicants.

DISCUSSION QUESTIONS

1. How can the Native Courtworker Program be adapted to better meet the diverse and changing needs of aboriginal people?

2. What optional models for legal service delivery should be examined and how can the federal government assist in exploring such new models as a legal services corporation, given the wide diversity of needs and the shared nature of responsibilities in these areas?

3. How can the federal government most effectively promote and support aboriginal participation in the legal profession?

4.5 COURTS AND ADJUDICATION

The issue of adjudication has been one of the most contentious over the past several years, no doubt in large part because it brings into sharp focus the consequences of different perceptions of justice and dispute resolution. The legal formalism and what may be seen as the punitive and denunciatory focus of western adjudication processes are often in stark contrast to traditional aboriginal approaches which emphasize healing, reconciliation and the restoration of social harmony. These concerns are often compounded by more practical problems such as the lack of adequate interpretation and translation, the lack of understanding by court personnel of local issues, particularly in those communities which have no regularly sitting court, and the corresponding discomfort among many aboriginal people with a court system they do not understand. Submissions to the Alberta Task Force demonstrate the pervasive view among aboriginal people that the court system is imposed on rather than part of the aboriginal community, that prosecutors initiate proceedings on behalf of the police or the system rather than the community and that judges make decisions without adequate understanding of or input by the community.

Clearly it will be necessary to develop approaches which respond to the desire of the aboriginal people of Canada for greater and more meaningful participation in the justice process and the increasing inclusion of justice components in self-government proposals. This will require consideration of a wide range of options consistent with shared principles of justice and fairness.

Cross-cultural Training

One area which holds great potential for immediate improvement, and is mentioned in virtually every inquiry and report, is cross cultural training. There

appears to be a clear consensus that an integrated strategy of cross cultural training should be developed for and with the judiciary and justice officials, building upon past programs and in conjunction with aboriginal people, training and education professionals and those involved in the administration of justice in provinces and territories.

The Department of Justice currently provides resources for training of all levels of the judiciary through contributions/ grants to the National Judicial Institute, the Canadian Association of Provincial Court Judges and the Western Judicial Centre. These resources have provided courses, sensitization training and the development of training materials for the judiciary. For example, the Nova Scotia Educational Seminar of the Canadian Judicial Centre, held in Halifax, June 1990, dealt with the issue of aboriginal people and the courts, particularly the sentencing of aboriginal people. In June 1991, the Department and two other federal departments provided the resources for a Western Judicial Education Centre program on sentencing, including small group cross cultural experiences with northern aboriginal people.

At the same time, organizations such as the Justice Institute of British Columbia, Holland College of Prince Edward Island, the School of Human Justice, University of Regina, Yukon College, Correctional Services of Canada, law schools, the RCMP, provincial governments, police colleges, to name a few examples, have been developing and presenting cross cultural training. The intensification of activity in this area, and the lack of good data on the effectiveness of the varying approaches taken, highlight the need for coordination.

Aboriginal Participation

For many aboriginal spokespersons the cross cultural training of non-aboriginal judges and officials can at best be only part of the solution. Some have argued

for the "indigenization" of the system through the appointment of aboriginal people as justice professionals at all levels including the judiciary. Some appear to favour the use of section 107 of the *Indian Act* to appoint aboriginal justices of the peace though it is recognized that their jurisdiction is limited and that they could not play a significant role in criminal cases. Several provinces have appointed aboriginal justices of the peace under provincial legislation. Again, the jurisdiction of these justices of the peace which is entirely within provincial legislative authority is limited. Nevertheless, tripartite consultations might yield innovative approaches, for example hybrid justices of the peace by cross appointments, that might meet the needs of some aboriginal communities.

Innovative Arrangements

Increasing attention is being given to a range of more innovative arrangements under the general rubric of alternative dispute resolution. This term captures a number of very different arrangements which have in common that they are community based, draw on aboriginal resources and customary approaches to dispute resolution and are delivered by aboriginal people. A number of proposals are under negotiation and some working models are in various stages of development. It seems evident to meet the diverse needs of aboriginal communities, a wide range of options will have to be considered:

- Justice Advisory Councils (or Elders Councils) may help to ensure community input in the court process and particularly sentencing;

- Peacemaker Courts (Mediation/Arbitration Tribunals) hold a great deal of promise for community involvement in civil disputes;

- Community Courts to hear offenses under community laws may be effective for securing community participation in the judicial system.

While these models have immediate and relatively easy application in civil matters, it may also be possible, working in co-operation with interested provinces and aboriginal communities, to build in capacity for pre-charge, pre-trial and pre-sentence diversion and consideration of bail matters and summary offence cases. While there are jurisdictional limitations to any of these options, all of them may be effective for securing greater aboriginal community participation in the judicial system, and any may serve as an initial step toward greater aboriginal responsibility for justice administration. The appropriate option must clearly reflect the needs and readiness of each community and while many initiatives could be implemented within current legislation, the evolution of such innovations, including a possible legislative base, may best be accomplished within a tripartite approach.

Recognizing that there can be no blueprint and that aboriginal communities must play a significant role in shaping such innovations, the Canadian Bar Association, in its 1988 report *Locking Up Natives In Canada* recommended a pilot project approach that would allow government and aboriginal communities to work together to develop creative approaches tailored to the Canadian situation.

A number of legal, jurisdictional and administrative issues will have to be addressed by governments and communities when considering specific proposals for innovative arrangements and a great deal of research and development will be necessary to help address these issues. In this context, the Assembly of First Nations (AFN) resolved in 1991 to establish an "Office for Indigenous Policing and Justice" and to undertake research on a range of topics "including the

maximum range of options possible with or within Canada" and "forums which focus on working models including training, financing, legal and jurisdictional issues".

DISCUSSION QUESTIONS

1. How might the federal government most effectively promote and support cross cultural training for judges and justice officials?

2. What measures can be taken to recruit and maintain more aboriginal people within the justice system?

3. What options for innovative judicial approaches hold most promise and what practical measures can the federal government take to help to test the effectiveness and appropriateness of such approaches?

4. How can the federal government most effectively support research and policy studies by aboriginal people on justice innovations?

4.6 SENTENCING

A particularly complex problem that merits separate consideration is the area of sentencing. Research has persistently shown that aboriginal people, particularly aboriginal offenders, believe that aboriginal offenders are sentenced more harshly in Canadian courts than are non-aboriginal offenders. On the surface these perceptions are at odds with recent research on sentencing patterns which has found no substantial differences in the sentencing and parole rate or in sentence length of aboriginals and non-aboriginals. There were no significant differences at the court level in making recommendations for community placements. The amount of time served in jail was the same for aboriginal as for non-aboriginal offenders. Both groups experienced the same parole rates. The re-incarceration rates were the same for both aboriginals and non-aboriginals. Canadian data on sentence and fine default admissions to provincial, territorial and federal correctional institutions show equal or marginally shorter sentence lengths for Aboriginal offenders.

What these data may mask is that apparently equal sanctions may be experienced unequally because of cultural differences and differences in circumstance. Department of Justice studies show that aboriginal offenders often understand neither the sentence hearing process nor the sentence itself. To the extent that the sentencing process is not culturally informed or culturally relevant, aboriginal people may experience the sentence as more harsh than intended or warranted. At the other extreme are those who find in sentences to incarceration an opportunity to escape the often extreme hardship and deprivation they encounter outside of prison. In either case, the sentence may not achieve its rehabilitative or deterrence objectives.

In fact, these issues may reflect a number of structural problems with sentencing as documented by the Canadian Sentencing Commission. In response to these and other related concerns, the Minister of Justice and the Solicitor General of Canada released in July, 1990, a Consultation Paper, entitled *Directions for Reform: Sentencing, Corrections and Conditional Release*, setting forth a broad range of reforms to these:

- a legislated Statement of Purpose and Principles of Sentencing;
- a Sentencing and Parole Commission;
- rules for evidence and procedure for the sentencing process;
- reforms to the imposition and collection of fines;
- a consultation process respecting intermediate sanctions.

The proposal concerning a legislated Statement of Purpose and Principles of Sentencing sets forth the fundamental purpose of sentencing as contributing to the maintenance of a just and peaceful society through the imposition of just dispositions. In addition, a number of objectives for sentencing are proposed, including the provision for reparations for the harm done to individual victims or to the community, and the promotion of a sense of responsibility on the part of offenders and the provision of opportunities to assist in their rehabilitation as productive and law-abiding persons. Finally, the proposals respecting a legislated Statement of the Purpose and Principles of Sentencing will include as principles that the deprivation of liberty may not be invoked until less restrictive alternatives have been considered. The proposal should assist the criminal justice system in

moving more towards dispositions which are based in the community and reduce reliance on incarceration.

The Sentencing and Parole Commission will assist in establishing a system within which there is as much mutual influence, understanding and communication as possible between sentencing and parole. This will encourage development of a consistent policy framework for both sentencing and conditional release. The Commission would have a mandate to examine the relationship between sentencing guidelines and other aspects of the criminal justice system and to ensure that an attempt to structure discretion at one point in the system does not adversely affect other aspects.

Reforms to the imposition and collection of fines should assist in removing a socio-economic bias from the system of penalties and will assist the economically disadvantaged, including aboriginal people. The process should help to ensure that the non-incarcerative intent of the judge in imposing a fine is, in fact, the sanction that the offender receives, rather than the much more debilitating sanction of incarceration.

The use of intermediate sanctions is subject to significant regional variation. In federal institutions, the percentage of offenders admitted for violent crimes has risen in recent years, although a significant percentage are still admitted for property crimes. Minor property or alcohol-related driving offenses have accounted for the highest percentage of admissions to provincial institutions for the past several years. The offenses of theft, possession of stolen goods and break and enter are the next highest offenses on admission. The statistics consistently show that three out of every ten admissions are for fine default. Advocates of intermediate sanctions have suggested expanding the range of options available to provide for effective, tough, non-incarcerative penalties.

These proposals provide a framework for working with aboriginal communities to devise appropriate means for increasing community input into the sentencing process and for making most effective use of traditional aboriginal sanctions and approaches to healing as alternatives to current sentencing practices.

DISCUSSION QUESTIONS

1. How can the federal government promote and support appropriate community involvement in sentencing?

2. What measures hold most promise for providing alternatives to incarceration appropriate to aboriginal communities and how can the federal government most effectively support such initiatives?

4.7 YOUNG OFFENDERS

Concerns with respect to aboriginal youth are well documented in recent research. Aboriginal young offenders face particular obstacles to fair and equitable treatment because of a lack of justice and social services, experienced local legal counsel and local detention facilities or community alternatives. The *Young Offenders Act* contains a number of provisions which have the potential for responding to aboriginal justice concerns by allowing aboriginal communities to assume more control over youth justice. For example, entrenchment of alternative measures for less serious offenses and minimum guidelines where such measures are used offer considerable scope for aboriginally-run programs for aboriginal youth in both urban and rural centres.

Further, the provision (s.7(5)) which allows a Lieutenant Governor in Council to designate a person or group of persons whose authorization is required, in all or specified circumstances, before a youth is detained offers a possible means of addressing concerns surrounding over-resort to pre-trial detention, particularly for aboriginal youth. Finally, the principles and provisions which require the "least possible interference with freedom" and which recognize "special needs" offer considerable scope for provinces/territories to create youth justice committees (s.69).

Clearly, these possibilities have not been fully exploited, particularly with respect to aboriginal youth. A legislative review of the *Young Offenders Act* is currently underway. Bill C-12, *An Act to Amend the Young Offenders Act and the Criminal Code*, is at Report Stage. It addresses the test for transfer, and the dispositions for youth convicted of murder in the youth and the adult courts. It extends the disposition for a youth convicted of murder in youth court to provide for an additional two years of

supervision in the community. From an aboriginal perspective, there is a concern that a disproportionate number of aboriginal youth get transferred. Further, there is concern that such youth are being placed in adult penitentiaries.

Other issues are under study and a second round of amendments is anticipated within the next year. These concern the following:

- the custody and review provision with the objective being to increase the use of alternatives to custody wherever possible;

- the provision with respect to special needs of young offenders with the objective being to enhance the opportunities for rehabilitation;

- the provision with respect to the admissibility of statements with the objective being to remove irritants while preserving the rights of young persons; and

- the placement of youth who have been transferred and convicted in adult court with the objective being to place such youth in youth facilities wherever appropriate.

DISCUSSION QUESTIONS

1. How can the federal government most effectively encourage the diversion of aboriginal youth from the justice system, and the greater use of alternatives to pre-trial detention and custody?

2. What practical measures can be taken to facilitate the earlier reintegration of youthful offenders into the community?

4.8 ADULT CORRECTIONS

Clearly, the over-representation of aboriginal people in federal and provincial corrections is a consequence of the full range of issues already discussed. To put this in other terms, the correctional system inherits the consequences of other social, economic, cultural and justice problems. To address over-representation will require a broad based approach. At the same time, given the unique problems encountered by aboriginal people in the correctional system, corrections reform itself must be a high priority.

Task Force on Aboriginal People in Federal Corrections

To examine how improvements could be made to federal corrections and to remove barriers to equitable opportunities and treatment for aboriginal offenders, the Solicitor General created the Task Force on Aboriginal People in Federal Corrections.

The Task Force Report, which was approved by the Solicitor General as the Ministry's long-term blueprint for aboriginal corrections, dealt with a number of substantive issues in the areas of research and statistics; case decision-making; programs and services; and the role of aboriginal communities. The Task Force went further than most previous studies by offering a number of strategic options for implementing the recommendations.

The Task Force confirmed that aboriginal offenders face unique difficulties in obtaining and completing early release, and that, even where they may face the same problems as non-aboriginal inmates, unique solutions are required because of their cultural and socio-economic backgrounds. The Report concluded that, to provide for equitable decision-making and equivalent opportunities for successful reintegration, government policies, structures and programs must reflect a willingness to enhance aboriginal

participation within the corrections system and to increase aboriginal responsibility for programs and services to the fullest extent allowable under existing legislative and constitutional frameworks.

Recognizing that the successful reintegration of aboriginal offenders depends, to a significant extent, on the support they receive from aboriginal communities before and after release, the Task Force noted a growing number of aboriginal individuals and organizations who assist inmates during and after their incarceration, through formal programs and liaison and informal visits and support.

The Task Force recommended that increased aboriginal involvement and participation be sought through the provision of adequate and appropriate information, increased liaison between communities and the corrections system and increased responsibility for aboriginal communities within the existing corrections system.

Federally Sentenced Aboriginal Women

The Correctional Service of Canada released its Task Force report on Federally Sentenced Women on April 20, 1990. The mandate of the Task Force was to examine the correctional management of federally sentenced women from the commencement of sentence to the date of warrant expiry and to develop a plan to guide this process in a manner that is responsive to the unique and special needs of women.

Although this Task Force focused on the need to improve the treatment of female inmates by creating more appropriate institutional settings, it also highlighted the need to increase the involvement of offenders' families and communities to improve their opportunities for successful reintegration, during the pre- and post-release phases of their sentences and for as long as required.

While representing only about 2 percent of Canada's female population, aboriginal women represent approximately 15 percent of the federal female offender population. The Task Force recognized that aboriginal women represent the most disadvantaged community in Canada. It further recognized that any strategy to facilitate the successful reintegration of aboriginal female offenders into their communities of choice must recognize the special needs and concerns of aboriginal women and the crucial role of aboriginal women in the community.

In accepting the Task Force's recommendation to create new, regional facilities to replace the Prison for Women in Kingston, the Solicitor General and the Minister responsible for Status of Women agreed to establish an Aboriginal Healing Lodge as an incarceration alternative for aboriginal women. The planning and development of this facility is being conducted with the direct participation of aboriginal women and the federal government is collaborating with aboriginal communities in the development of institutional programs and aftercare opportunities. It will be important more generally to ensure that aboriginal women have a voice in shaping justice reform.

Directions for Reform

The 1990 Directions for Reform package, discussed previously, recognized the critical role of programs in promoting the rehabilitation of aboriginal offenders. As part of the package, a new *Corrections Act* and *Parole Act* have been proposed with the potential to significantly increase the involvement of aboriginal communities in corrections activities.

The proposed legislative amendments would authorize the Correctional Service of Canada to enter into agreements with aboriginal communities to permit them to assume greater control and custody over aboriginal offenders.

Implementation

Flowing out of these initiatives, the Correctional Service of Canada has been implementing a large number of reforms nationally and regionally and both the Correctional Service and the National Parole Board have been exploring approaches to improve cross cultural training for correctional staff and Board members.

In addition, over the past several years, the federal government has also supported a number of developmental and experimental projects in Aboriginal communities. These projects are designed to gather information about innovative approaches to community corrections which are then shared with other Aboriginal communities across Canada. For example, the Ministry of the Solicitor General and the Department of Justice currently contribute funds to the Dakota Ojibway Probation Service in Manitoba which is exploring methods of making probation services more culturally appropriate by increasing community participation and control over those services. In addition, the Ministry of the Solicitor General is also supporting a project with the Aboriginal Legal Services of Toronto which is examining the needs of Aboriginal offenders released to the Toronto area and will be proposing practical methods of meeting those needs. The Ministry has recently concluded a project with the National Native Association of Treatment Directors which tested model pre-treatment programs in two federal institutions and examined methods of increasing the number of Aboriginal treatment centres accepting released offenders.

Approximately 15 years after the signing of the 1975 *James Bay and Northern Quebec Agreement*, an agreement has been reached with the Inuit of Quebec which will discharge outstanding federal obligations respecting corrections. The federal government will participate in a tripartite Working Group which, over

a twelve month period, will explore methods of improving justice delivery in Inuit communities. At the provincial and territorial level, a number of aboriginal justice reviews have considered corrections issues. Recommendations from these reviews are being used by provinces and territories as a means to develop innovative approaches to corrections in aboriginal communities. The federal government has supported these initiatives and is prepared to work with the provinces and aboriginal peoples to improve community corrections opportunities in aboriginal communities.

DISCUSSION QUESTIONS

1. What should be the federal priorities for improving institutional corrections for aboriginal men and for aboriginal women?

2. What approaches to community corrections show greatest promise for meeting the needs of aboriginal communities and how can the federal government most effectively promote and support initiatives in this area?

CHAPTER 5
Conclusion

5.1 CONCLUSION

The federal government is committed to making the justice system more inclusive, fair and effective. Reform of justice administration to address the needs, concerns and aspirations of aboriginal people will only succeed if aboriginal people are full participants in shaping policies and programs, shaping the direction of justice administration reform.

We welcome your views.

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DISCUSSION QUESTIONS

1. How can the federal government most effectively encourage and support the participation of aboriginal people in developing national policies and programs of justice administration?

2. How can the federal government most effectively support tripartite participation in developing and coordinating initiatives at the regional, provincial, territorial and local levels?

3. How can the federal government most effectively encourage and support the participation of aboriginal women to ensure that policies and programs of justice administration reflect their special needs and concerns and their special role in aboriginal communities?

4. How can the federal government most effectively encourage and support the participation of disabled aboriginal people to ensure that policies and programs reflect their needs and concerns?